

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



January 12, 2006

Agenda ID # 5266

TO: PARTIES OF RECORD IN APPLICATION 05-04-028

This is the draft decision of Administrative Law Judge (ALJ) Prestidge. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3, opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN By PHILIP S. WEISMEHL

Angela K. Minkin, Chief
Administrative Law Judge

ANG:niz

Attachment

Decision **DRAFT DECISION OF ALJ PRESTIDGE** (Mailed 1/12/2006)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

The Application of Empire One
Telecommunications, Inc. for Approval of a
Merger Agreement and Authority to Transfer
Ownership.

Application 05-04-028
(Filed April 28, 2005)

**OPINION DISMISSING APPLICATION FOR
FAILURE TO COMPLETE THE APPLICATION****I. Summary**

This decision dismisses the application of Empire One Telecommunications, Inc. (Empire 1), Fonix Corporation (Fonix), and TOE Acquisition Corporation (TOE) (together, Applicants) based on Applicants' failure to complete the application.

II. Discussion

On April 28, 2005, Applicants filed an application for Commission approval of a merger agreement dated November 19, 2004. Under the merger agreement, TOE, a wholly owned subsidiary of Fonix, would merge with Empire 1. Empire 1 would survive the merger and would become a wholly owned first-tier subsidiary of Fonix. Empire 1 currently holds a Certificate of Public Convenience and Necessity (CPCN) authorizing the provision of resold telecommunications services in this state.

Upon review of the application, the assigned Administrative Law Judge (ALJ) determined that additional information was needed to process the application. The assigned ALJ therefore directed Applicants in writing to submit

a supplemental filing that would include certifications, additional information regarding the ongoing management of Empire 1 after the merger, and additional financial documentation by no later than September 1, 2005.

Applicants did not respond to the assigned ALJ's letter and failed to make the required supplemental filing or to request an extension of time within which to do so by September 1, 2005.

A representative of Empire 1 subsequently contacted the assigned ALJ regarding the status of this proceeding. The assigned ALJ advised Empire 1 that if Applicants wished to complete their application, they could request an extension of time within which to make the supplemental filing and should provide an explanation of their failure to meet the September 1, 2005 deadline.

To date, Applicants have not made the required supplemental filing and have not requested an extension of time within which to do so.

This application cannot be left open indefinitely. Applicants have been given more than a reasonable opportunity to complete their application for approval of the merger agreement and authority to transfer ownership. Therefore, the application shall be dismissed based on Applicants' failure to complete the application. This order will be made effective immediately in order to clear this application from the Commission's list of active proceedings.

III. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

IV. Categorization and Need for Hearings

In Resolution ALJ 176-3152 dated May 5, 2005, the Commission preliminarily categorized this application as ratesetting, and preliminarily

determined that hearings were not necessary. No protests have been received. Applicants have failed to complete this application, despite being given more than a reasonable opportunity to do so. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

V. Assignment of Proceeding

Dian Grueneich is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. Applicants failed to comply with the assigned ALJ's September 15, 2005 ruling, which directed Applicants to file information regarding certifications, the ongoing management of Empire 1 after the merger, and additional financial documentation by no later than September 1, 2005, within 30 days in order to avoid dismissal of the application.
2. Applicants have failed to request an extension of time within which to comply with the assigned ALJ's September 15, 2005 ruling.
3. The application cannot be left open indefinitely.
4. Applicants have failed to complete the application, despite being given more than a reasonable opportunity to do so.

Conclusions of Law

1. The application should be dismissed based on Applicants' failure to complete the application.
2. This order should be made effective immediately in order to clear this application from the Commission's list of active proceedings.

O R D E R

IT IS ORDERED that:

1. Application 05-04-028 is dismissed.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.